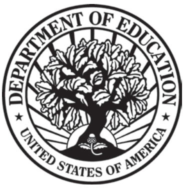

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE SECRETARY

In the matter of

THE HAIR CALIFORNIA BEAUTY ACADEMY

Respondent.

Docket No. 18-13-SP

Federal Student Aid Proceeding

PRCN: 201120927403

DECISION OF THE SECRETARY[1]

The Hair California Beauty Academy of Orange, California (HCBA) has appealed the July 2, 2019, decision (Decision) issued by Administrative Judge Robert G. Layton. The Decision upheld a total liability of $248,051 and any additional interest by the office of Federal Student Aid (FSA) in its December 26, 2017, Final Program Review Determination (FPRD).

Based on the following analysis, I affirm the administrative judge's Decision.

Background

HCBA is an unaccredited proprietary institution of higher education in Orange, California, offering programs authorized by the State of California leading to eligibility to apply for the California Board of Barbering and Cosmetology examination.[2] At one time, HCBA participated in federal student aid programs under Title IV of the Higher Education Act of 1965 (HEA), as amended, 20 U.S.C. § 1070, *et seq*. (Title IV).[3] From January 11 through January 14, 2011, FSA staff conducted a review of HCBA's Title IV records.[4] The record shows that the program review process continued for several years prior to FSA's issuance of a program review report.[5] During that time, on December 13, 2013, then-owner Thuy Witham sold HCBA to its

[1] Secretary of Education Betsy DeVos resigned as Secretary effective January 8, 2020. In accordance with 20 U.S.C. § 3412(a)(1) which states in pertinent part ". . . in the event of a vacancy in the office of the Secretary, the Deputy Secretary shall act as Secretary," Deputy Secretary Mitchell M. Zais began his service as the Acting Secretary upon the vacancy.

[2] HCBA School Catalog, Updated Oct. 1, 2020 at 5. HCBA was accredited by the National Accrediting Commission of Career Arts and Colleges from January 1, 2004, to July 19, 2018.

[3] The record does not indicate when HCBA ceased participating in Title IV, but HCBA does not appear in the current Federal School Code List of Title IV-eligible institutions. Federal Student Aid, iLibrary – Federal School Code List located at https://ifap.ed.gov/ilibrary/document-types/federal-school-code-list (last visited Jan. 15, 2020).

[4] Decision at 2.

[5] *Id*.

current owners, the members of New America Beauty Education Corporation (New America), for $600,000.[6] Thereafter, New America exchanged communications with FSA on behalf of HCBA with regard to the ongoing program review. For instance, on September 16, 2015, New America staff told FSA that they "became owners in January 2014" and asserted that they could not be held accountable for the previous owners' actions or inactions prior to their purchase of HCBA.[7]

On July 22, 2014, HCBA began participating in Title IV under New America's ownership using a provisional Program Participation Agreement (PPA).[8] The terms of the PPA included a statement that a program review was conducted by FSA and that HCBA is "accountable for all program review liabilities and fines and to resolve all deficiencies."[9] On April 5, 2016, FSA imposed Heightened Cash Monitoring 2 (HCM2) status on HCBA for "failure to submit complete responses to significant findings in the Program Review Report, after repeated requests for such."[10] On December 26, 2017, FSA issued the FPRD, including nine findings of liability for award years 2009-2010 and 2010-2011. HCBA appealed to the Department's Office of Hearings and Appeals, which assigned the administrative judge to hear the case.

Before the administrative judge, HCBA did not contest the legal basis of the findings in the FPRD. Rather, it argued that it should not be liable for failure to provide records to FSA created before New America took over the institution. It also argued that the liability finding constitutes a fine which is barred from collection by the statute of limitations.

The administrative judge found against HCBA on each point. First, the administrative judge found that HCBA owed a fiduciary duty to the Department to act with the highest standard of care and diligence in its efforts to comply with Title IV requirements. The administrative judge found that New America agreed to "step into the shoes of the previous owners" when they executed the provisional PPA to immediately begin participating in Title IV programs, rather than establishing the qualification to participate in Title IV programs during an initial 2-year period.[11]

Second, the administrative judge found that the liability based on the findings does not constitute a fine. The amount of liability is not punitive, but compensatory for the exact amount calculated for which HCBA cannot show through its records that it disbursed in full compliance

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[6] *Id*.
[7] *Id*.
[8] *Id*. at 3; HCBA Brief to OHA Ex. R-2 (FPRD) at App'x I (HCBA Program Participation Agreement).
[9] Decision at 3.
[10] *Id*. at 4; HCM2 status requires the institution to provide institutional funds to Title IV-eligible students and then seek reimbursement from the Secretary. 34 C.F.R. § 668.162(d) ("Under the heightened cash monitoring payment method, an institution must credit a student's ledger account for the amount of title IV, HEA program funds that the student or parent is eligible to receive, and pay the amount of any credit balance due under § 668.164(h), before the institution" seeks reimbursement from the Department.).
[11] Decision at 12–13 (citing 34 C.F.R. §§ 600.20(g) and (h) (permitting an institution that undergoes a change in ownership to continue participating in Title IV programs under the terms of a provisional PPA "on a provisional basis, if the institution under the new ownership submits a 'materially complete application' that is received by the Secretary no later than 10 business days after the day the change occurs.").

with Title IV requirements.[12] Therefore, the amount is not discretionary or subject to reduction based on mitigating factors. Because the liability is not a fine, recovery of the liability is also not barred by a statute of limitations for assessment of fines and civil penalties.[13]

The administrative judge affirmed the FPRD and upheld the full liability.[14] The administrative judge found that many of the liabilities were duplicated across the nine findings. With duplicated liabilities removed, the total liability owed by HCBA to the Department was $248,051.00, plus interest calculated at $10,961.65 and another $60.00 owed directly to a student for overcharging tuition in the student's enrollment agreement.[15]

HCBA has appealed the administrative judge's Decision to me. I now turn to my legal analysis.

Analysis

An institution has a fiduciary duty to the Department to ensure that Title IV funds are only disbursed to eligible students.[16] An institution "is subject to the highest standard of care and diligence" in administering Title IV programs and accounting for funds it receives.[17] As part of its oversight duties, FSA conducts program reviews to confirm that schools meet Department requirements for institutional eligibility, financial responsibility, and administrative capability. These reviews include examination of policies and procedures, review of individual student financial aid and academic files, and other academic and fiscal records.[18] Institutions are obligated to retain types of records enumerated in the regulations to demonstrate their compliance with all Title IV rules and to provide such records while otherwise cooperating with the Department's program reviews and audits.[19] An institution must account for all Title IV funds received.[20]

In the context of this legal framework, I consider each of HCBA's arguments in turn.

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[12] *Id*. at 15.
[13] *Id*. at 15–16.
[14] *Id*. at 16.
[15] *Id*. at 4–5, 6.
[16] 34 C.F.R. § 668.82(a) ("A participating institution or a third-party servicer that contracts with that institution acts in the nature of a fiduciary in the administration of the Title IV, HEA programs. To participate in any Title IV, HEA program, the institution or servicer must at all times act with the competency and integrity necessary to qualify as a fiduciary"); *In re Hope Career Inst.*, Dkt. No. 06-45-SP, U.S. Dep't of Educ. (Jan. 15, 2008) at 3.
[17] 34 C.F.R. § 668.82(b)(1) ("A participating institution is subject to the highest standard of care and diligence in administering the programs and in accounting to the Secretary for the funds received under those programs").
[18] *Id*. § 668.24(f)(1) ("An institution that participates in any title IV, HEA program and the institution's third-party servicer, if any, shall cooperate with an independent auditor, the Secretary, the Department of Education's Inspector General, the Comptroller General of the United States, or their authorized representatives, a guaranty agency in whose program the institution participates, and the institution's accrediting agency, in the conduct of audits, investigations, program reviews, or other reviews authorized by law.").
[19] *Id*. § 668.24 (listing types of records that institutions are required to maintain and obligating institutions to provide them for audits and program reviews).
[20] *Id*. § 668.82(b)(1).

FSA's Program Review Process and the Defense of Laches

First, HCBA argues that the length of time elapsed during the program review process–4 ½ years–from the start of the review in January 2011 to issuance of the program review report in July 2015, "was both unreasonable and prejudicial."[21] HCBA asserts that New America did not know about the outstanding program review, and even the previous owner assumed that the review had ended due to the lack of a forthcoming program review report.[22] Additionally, HCBA asserts the required retention period expired for the financial aid records germane to the program review, so FSA has levied a fine for failure to maintain and reconcile records it was not legally required to have.[23] Based on these circumstances, HCBA asserts that the doctrine of laches–a defense based on the complaining party's unreasonable, prejudicial delay in bringing a legal action–applies to FSA's FPRD, making the liability unenforceable by FSA.[24]

FSA responds that the basic rule applicable to this case is that "the Department must be assured that [Title IV] funds were properly disbursed by eligible institutions and received by eligible students."[25] Failure to properly account for funds compels repayment by the institution to the Department.[26] FSA asserts that New America stepped into the shoes of the previous owner, owing these basic duties to the Department and adopting any liability associated with HCBA's past participation in Title IV programs.[27] FSA asserts that HCBA cannot rely on the doctrine of laches in this appeal because it did not raise that affirmative defense before the administrative judge.[28] Furthermore, regardless of the legal test inherent in considering the doctrine of laches, FSA argues that HCBA was properly notified of its ongoing program review well within the timeframe for retaining records that would be germane to that review.[29] This notification was accomplished by the February 4, 2011, letter notifying HCBA that it was being placed on HCM2 status "because the program review had 'disclosed serious findings indicating lack of administrative capability of HCBA's administration of the Title IV, HEA programs.'"[30]

Institutions are required to retain records that can be used to verify student eligibility for Title IV funds.[31] The passage of time from the start of a program review to issuance of an FPRD

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[21] HCBA Brief at 6.
[22] *Id*.
[23] *Id*.
[24] *Id*. at 7.
[25] FSA Brief at 6.
[26] *Id*.
[27] *Id*. at 7.
[28] *Id*.
[29] *Id*. at 10.
[30] *Id*. at 10–11 (quoting Feb. 4, 2011 Letter from FSA to HCBA).
[31] 34 C.F.R. § 668.16 ("To begin and to continue to participate in any Title IV, HEA program, an institution shall demonstrate to the Secretary that the institution is capable of adequately administering that program under each of the standards established in this section. The Secretary considers an institution to have that administrative capability if the institution— (f) Develops and applies an adequate system to identify and resolve discrepancies in the information that the institution receives from different sources with respect to a student's application for financial aid under Title IV, HEA programs. In determining whether the institution's system is adequate, the Secretary considers whether the institution obtains and reviews—
(1) All student aid applications, need analysis documents, Statements of Educational Purpose, Statements of Registration Status, and eligibility notification documents presented by or on behalf of each applicant;

does not absolve an institution from its duty to provide such records. In a past departmental decision, then-Secretary Arne Duncan held that an institution making HBCA's argument "must demonstrate that the delay between the program review and the issuance of the [program review report] was unreasonable, unexplained or prejudicial, as well as how FSA's failure to act during this period of time hindered [the institution's] ability to respond to the [program review report]. The mere passage of time does not *per se* constitute an unreasonable delay."[32] HCBA was aware at all relevant times that it was the subject of a program review and knew to retain appropriate records. HCBA has failed to show how the time it took for FSA to issue the FPRD specifically prejudiced it. Furthermore, it is well settled that the defense of laches does not apply to the Department's program reviews and audit determinations.[33] Therefore, I reject HCBA's argument.[34]

FSA's Failure to Notify HCBA of the Program Review

HCBA next argues that FSA failed to disclose material information. Specifically, HCBA asserts that the PPA did not disclose to New America that a program review remained ongoing at the time New America signed it.[35] HCBA asserts that the language of the PPA was "generic and boilerplate" and its disclosure that a program review remained ongoing was "buried" and "vague."[36] Even if New America had conducted due diligence, HCBA asserts that New America would have found no records in possession of the previous owner to indicate that the review begun in 2011 was ongoing at the time the new owners purchased HCBA.[37] Because of this purported lack of disclosure, HCBA argues that it "would be both unconscionable and unfair to allow a government agency like the FSA to fail to disclose material information and then ambush an innocent party like New America with a potentially business-ending liability."[38]

FSA answers HCBA's arguments by asserting that the language in the PPA is clear in disclosing the ongoing program review and potential liability.[39] FSA suggests that HCBA's argument amounts to one of equitable estoppel.[40] FSA seeks to refute the application of that legal doctrine by demonstrating that FSA made no misrepresentation or omission of the facts and because equitable estoppel does not apply against the federal government.[41]

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(2) Any documents, including any copies of State and Federal income tax returns, that are normally collected by the institution to verify information received from the student or other sources; and
(3) Any other information normally available to the institution regarding a student's citizenship, previous educational experience, documentation of the student's social security number, or other factors relating to the student's eligibility for funds under the Title IV, HEA programs.").

[32] *In re Inst. of Med. Educ*., Dkt. Nos. 12-59-SA, 13-58-SP, U.S. Dep't of Educ. (Decision of the Secretary) (Aug. 18, 2014) at 5.

[33] *In re Comm. Coll. System of New Hampshire*, Dkt. No. 09-35-SA, U.S. Dep't of Educ. (Jun. 21, 2010).

[34] Although the passage of time does not render the FPRD legally deficient, I note that Former Secretary Betsy DeVos "instructed FSA to take prompt action to ensure program reviews are completed in a more timely manner." *In re Hiwassee Coll.*, Dkt. No. 17-54-SP, U.S. Dep't of Educ. (Decision of the Secretary) (Jan. 14, 2021) at 10.

[35] HCBA Brief at 8.

[36] *Id*. at 9.

[37] *Id*. at 10.

[38] *Id*.

[39] FSA Brief at 12 (citing page 3 of the PPA which states that "a program review . . . was conducted" at HCBA and New America is "accountable for all program review liabilities and fines and to resolve all deficiencies").

[40] *Id*.

[41] *Id*. at 11–14.

I find the PPA agreed to by New America is abundantly clear. The PPA explicitly states on the third page:

> *Program Review Condition*
>
> A program review of the institution's administration of the Title IV, HEA Programs was conducted. The institution is accountable for all program review liabilities and fines and must resolve all deficiencies. The program review liabilities must be paid by the date specified in the Final Program Review Determination Letter establishing the liabilities, and paid in full prior to the expiration of the Program Participation Agreement unless (a) the determinations of the program review are under appeal, or (b) alternative payment arrangements have been made with the Department's Debt Collection Services.[42]

Even if I were to entertain HCBA's estoppel argument, it would fail based on the notice provided by the provisional PPA to New America. Therefore, I reject HCBA's argument.

Application of the Statute of Limitations to HCBA's Liability

Finally, HCBA construes the financial liability in this case to be "a *fine* and *penalty* subject to the five-year statute of limitations" at 28 U.S.C. § 2462.[43] The statute of limitations at 28 U.S.C. § 2462 requires, in relevant part, that "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued."

HCBA asserts that New America "did not receive the funds in question, nor any benefit from the students who received the funds, because all of these students pre-dated New America's purchase of HCBA."[44] Therefore, HCBA asserts that the liability is a "disgorgement of wrongfully obtained gains" that leaves New America "significantly worse off than before it purchased HCBA."[45] As discussed further below, HCBA relies on the recent decision *Kokesh v. Securities and Exchange Commission* for its theory that recovery of its liability in this case constitutes disgorgement.[46] This makes collection of the liability, according to HCBA, "punitive in nature as applied to New America."[47]

FSA responds that findings of liability to recover Title IV funds are not fines or penalties under 28 U.S.C. § 2462, but rather, liabilities pursuant to a fiduciary relationship between HCBA and the Department.[48] New America deliberately stepped into the shoes of the previous owner

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[42] HCBA Brief to OHA Ex. R-2 (FPRD) at App'x I (HCBA Program Participation Agreement).
[43] *Id*. at 10 (emphasis added).
[44] *Id*. at 11.
[45] *Id*. at 12.
[46] *Id*. at 11–12 (citing *Kokesh v. Securities and Exchange Comm'n*, 137 S.Ct. 1635 (2017).
[47] *Id*. at 13.
[48] FSA Brief at 15.

and assumed HCBA's potential liabilities, despite New America's assertion that it did not benefit from the funds in question.[49]

It is well-settled precedent that an institution's liability to the Department for Title IV funds resulting from an FPRD is in the nature of a debt to the government, incurred by failing to comply with the terms of the Title IV program, and does not constitute a fine or penalty.[50] Actions with respect to fines, and limitations and termination, and suspension of Title IV eligibility are appealable under 34 C.F.R. Part 668 Subpart G; an FPRD arising from a program review is appealable under 34 C.F.R. Part 668 Subpart H.[51] Liability resulting from an audit determination or program review determination is calculated as the funds for which an institution cannot demonstrate it met all requirements for participation in the Title IV program.[52] An institution has a fiduciary duty to the Department to ensure that Title IV funds are only disbursed to eligible students.[53] The institution must return to the Department any funds it cannot demonstrate were handled within the requirements of the Title IV program.[54] Because HCBA's liability is not a "fine," the statute of limitations at 28 U.S.C. § 2462 does not apply.

I now turn to whether an institution's liability to the Department constitutes a "penalty." On this question, HCBA's reliance on *Kokesh* is misplaced. In that case, the SEC brought an enforcement action against an investment adviser for misappropriating $34.9 million from four development companies.[55] The SEC sought civil monetary penalties for misappropriation of funds, but the trial court found such penalties limited to activity within the 5-year statute of limitations.[56] The SEC also sought disgorgement for the entire period of Kokesh's misconduct, from 1995 to 2009, under the theory that disgorgement is not a "penalty" under the statute of limitations.[57] However, the Supreme Court ruled narrowly that "SEC disgorgement" is a "penalty" because it "is imposed by the courts as a consequence for violating . . . public laws" and because it "is imposed for punitive purposes" which are "intended to deter, not to compensate."[58]

The case before me is distinguishable from *Kokesh*. First, payment of liabilities by an institution to the Department for failing to properly disburse and account for Title IV funds is not imposed as a "consequence for violating . . . public laws" like SEC disgorgement. Payment of

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[49] *Id*.
[50] *In re Cabot Coll.*, Dkt. No. 97-15-SP, U.S. Dep't of Educ. (Oct. 30, 1998) ("Subpart H proceedings are contractual in nature and do not extend to punitive measures.").
[51] *In re Salinas Beauty Coll.*, Dkt. No. 18-67-SP, U.S. Dep't of Educ. (Feb. 14, 2020) at 5.
[52] *Id*. at 6 ("'The function of the program review is not to punish institutions for wrongful acts. The function is to safeguard the federal dollars which are disbursed through the program on behalf of FSA . . . and, where appropriate, require the institutions to repay wrongfully obtained funds.' *In re Salon and Spa*, Dkt. No. 16-23-SP, U.S. Dep't of Educ. (Jan. 18, 2018) at 2.").
[53] 34 C.F.R. § 668.82(a) ("A participating institution or a third-party servicer that contracts with that institution acts in the nature of a fiduciary in the administration of the Title IV, HEA programs. To participate in any Title IV, HEA program, the institution or servicer must at all times act with the competency and integrity necessary to qualify as a fiduciary."); *In re Hope Career Inst.*, Dkt. No. 06-45-SP, U.S. Dep't of Educ. (Jan. 15, 2008) at 3.
[54] *Id*.
[55] *Kokesh v. Securities and Exchange Comm'n*, 137 S. Ct. 1635, 1641 (2017).
[56] *Id*.
[57] *Id*.
[58] *Id*. at 1643–44.

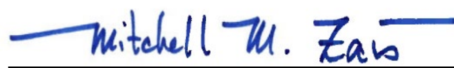
liabilities is required because an institution is a voluntary participant in the Title IV program and must return any funds for which the institution cannot properly account.

Second, payment of liabilities is not "imposed for punitive purposes" or "to deter, not to compensate" like SEC disgorgement. As discussed above, the Department is merely trying to recover funds to which it holds a legal right. Payment of liabilities serves "to compensate" because it is measured only by the amount of funds which are not properly accounted for by the institution.[59] Therefore, I reject HCBA's argument that the holding in *Kokesh* transforms HCBA's liabilities into civil penalties subject to 28 U.S.C. § 2462.

ORDER

ACCORDINGLY, the Decision of Administrative Judge Layton is hereby AFFIRMED. HCBA's financial liability of $248,051 and any additional interest is upheld.

So ordered this 15th day of January 2021.



Mitchell M. Zais, Ph.D.
Acting Secretary

Washington, DC

[59] *In re Salinas Beauty Coll.*, Dkt. No. 18-67-SP at 7.

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